Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	(Report to Congress)

COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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The Personal Communications Industry Association[1] hereby submits its comments in response to the Public Notice requesting comment in connection with the Commission's report to Congress regarding implementation of the universal service program.[2] As indicated in the *Public Notice*, Congress has directed the Commission to report, in detail, on the extent to which the Commission's interpretations in specified areas are consistent with the plain language of the

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[1] PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Site Owners and Managers Association, the Association of Wireless Communications Engineers and Technicians, the Private Systems Users Alliance, and the Mobile Wireless Communications Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

[2] FCC Public Notice, *Common Carrier Bureau Seeks Comment for Report to Congress on Universal Service Under the Telecommunications Act of 1996*, DA 98-2 (rel. Jan. 5, 1998) *("Public Notice")*. The original comment date was extended to January 26, 1998. *Federal-State Joint Board on Universal Service*, DA 98-63 (rel. Jan. 14, 1998) (Order).

Communications Act of 1934, as amended by the Telecommunications Act of 1996.[3] PCIA believes that the Commission's determinations and actions to date regarding the obligation of commercial mobile radio service ("CMRS") providers to contribute to state universal service funds, the universal service fund contribution requirements of certain resellers, the publication of telecommunications carriers' obligations to comply with the new universal service reporting and funding obligations, and the content of and instructions for the Form 457 are matters that should be taken into account in the Commission's report to Congress.

I. SUMMARY

There are a number of disagreements and questions concerning the Commission's interpretation of the statutory requirements related to universal service and its implementation of a reporting and collection system that should be included in the report to Congress. Identifying these issues will ensure that Congress is provided with information that paints a complete picture and allows Congress to evaluate whether legislative action is warranted.

Initially, there is serious question whether the Commission has properly interpreted Sections 332 and 254 in concluding that CMRS operators may be required to contribute to state universal service plans. While the Commission has rejected all arguments to the contrary on this issue, proceedings are still pending before the Commission, and appeals have been filed in the United States Court of Appeals for the D.C. Circuit. PCIA continues to believe that the Commission has failed to give the statutory language its clear interpretation.

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[3] Pub. L. 105-119, § 623, 111 Stat. 2440, 2521 (1997).

Second, the Commission has imposed conflicting requirements related to the contribution obligations of resellers. Although the Commission has found that resellers should be included among the category of mandatory contributors, it has shifted the burden of enforcing the resellers' universal service obligations onto the underlying facilities-based carriers. There is no justification for such action. In addition, the recent decision on reconsideration in the universal service docket to revise the *de minimis* exemption and to shift the revenue reporting and contribution burden to the facilities-based carriers creates substantial burdens for the facilities-based carriers that apparently were not recognized by the Commission. These problems with the Commission's structure for collecting contributions from resellers should be reported to Congress.

Third, the Commission has failed to undertake a responsible campaign to advise all affected entities of their obligations under the universal service program. Instead, the Commission has relied upon trade associations to provide notice about significant regulatory requirements. In the absence of adequate publication by the Commission, the agency cannot be sure that all covered entities are making their required contributions to the universal service fund.

Fourth, the Form 457 and related instructions also raise questions about the even-handedness of the Commission's interpretation and administration of the universal service program. The problems with the Form 457 include the following:

- The form appears to be based on accounting practices and requirements applicable to traditional landline telephone carriers, but which are wholly foreign to most CMRS operators.
- The Commission has failed to provide adequate guidance concerning the proper allocation of CMRS traffic and revenues between the interstate and intrastate jurisdictions.

- Form 457 imposes unnecessary requirements for individual submissions by affiliated companies
- The form improperly calls for submission of information concerning the total amount of billables rather than actual revenues.
- Carriers are required by the current Form 457 instructions to include certain billing and collection fees (activation charges) as part of the revenues subject to universal service contribution.
- Form 457 requires submission of information that is not necessary for universal service contribution calculations.

Congress should be informed that the universal service reporting mechanisms now in place have raised questions and concerns for a number of the carriers required to participate in the program as contributors.

II. THE COMMISSION'S CONCLUSION THAT CMRS PROVIDERS MAY BE REQUIRED TO CONTRIBUTE TO STATE UNIVERSAL SERVICE FUNDS IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE TELECOMMUNICATIONS ACT[4]

In at least three separate orders, the Commission has determined that CMRS providers may be required by states to make contributions to state universal service funds.[5] As PCIA and other parties have repeatedly argued to the Commission, however, this interpretation is clearly at

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[4] This section addresses issues associated with item 5 of the *Public Notice*.

[5] *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9181 (1997) (Report and Order) ("*Universal Service Report & Order*"); *Petition of Pittencrief Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, FCC 97-343 (rel. Oct. 2, 1997) (Memorandum Opinion and Order) ("*Pittencrief Declaratory Ruling*"); *Federal-State Joint Board on Universal Service*, FCC 97-420, ¶¶ 299-305 (rel. Dec. 30, 1997) (Fourth Order on Reconsideration) ("*Universal Service Fourth Order on Reconsideration*").

odds with the statutory language embodied in Section 332(c)(3) of the Communications Act of 1934, as amended.

The clear language of Section 332(c)(3)(A) indicates that states cannot require CMRS providers to contribute to their intrastate universal service funds unless CMRS is used as a substitute for landline local exchange service for a "substantial portion" of the state's communications:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (*where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State*) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[6]

The enactment of Section 254, in and of itself, does not serve to repeal this portion of Section 332(c), given that it is "a cardinal principle of statutory construction that repeals by implication are not favored,"[7] and "courts will not find repeals by implication unless legislative intent to repeal is 'clear and manifest.'"[8] Because nothing in the text or legislative history of Section 254 indicates an intent to repeal Section 332(c), the Commission has erroneously presumed that such a repeal has occurred.

Indeed, the Telecommunications Act of 1996 itself confirms the conclusion that Section 254 was not intended to repeal by implication the provisions of Section 332(c)(3)(A). Section

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[6] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

[7] *Radzanower v. Touche Ross and Co.*, 426 U.S. 148, 154 (1976).

[8] *Independent Community Bankers Ass'n of South Dakota, Inc. v. Board of Governors of the Federal Reserve System*, 820 F.2d 428, 438 (D.C. Cir. 1987) (quoting *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 1262 (1986)), *cert. denied*, 484 U.S. 1004 (1988).

601(c)(1) of the 1996 Act states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless *expressly so* provided in such Act or amendments."[9] Nothing in either Section 254 or the remaining sections of the Telecommunications Act of 1996 expressly modifies, impairs, or supersedes Section 332(c)(3). The Commission's interpretation is also directly at odds with the decision in *MetroMobile CTS of Fairfield County v. Connecticut Department of Public Utility Control,*[10] which found that, even after the enactment of Section 254(h), Section 332(c)(3)(A) prohibited the state of Connecticut from requiring cellular carriers to contribute to its universal service fund.

Notwithstanding the demonstrations made by a number of interested parties in both this proceeding and the *Pittencrief* declaratory ruling proceeding that CMRS operators may not be required to contribute to state universal service funds, the Commission has persisted in distorting the application of the statutory language and the standards for interpreting such language in order to conclude otherwise. As a result, a petition for reconsideration has been filed with the Commission regarding the *Pittencrief Declaratory Ruling*,[11] and three parties have sought review

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[9] Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (1996) (emphasis added).

[10] No. CV-95-0551275S (Conn. Super. Ct. Dec. 11, 1996). The Commission's reliance on *Mountain Solutions, Inc., et al. v. State Corporation Commission of the State of Kansas, et al.*, Civil Action No. 97-2116-GTV (D. Kan. May 23, 1997), is misplaced, since that decision is based on an illogical reading of the statute that renders significant portions of the legislation redundant.

[11] Petition for Reconsideration or Withdrawal filed by Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc., File No. WTB/POL 96-2 (filed Nov. 3, 1997).

of the Commission's action in the United States Court of Appeals for the D.C. Circuit.[12] While PCIA continues to believe that the Commission has incorrectly interpreted the clear statutory language, at minimum, the fact that there is a dispute in this significant area for CMRS operators should be disclosed and explained in the Commission's report submitted to Congress.

III. THE COMMISSION HAS ACTED INCONSISTENTLY IN ITS TREATMENT OF RESELLERS AND THEIR OBLIGATION TO MAKE PAYMENTS INTO THE UNIVERSAL SERVICE FUND, THEREBY RAISING A NUMBER OF QUESTIONS FOR FACILITIES-BASED OPERATORS[13]

When the Commission defined the mandatory contributors to the universal service support mechanisms, it made clear that resellers of telecommunications services were included.[14] Action taken in the recent *Universal Service Fourth Order on Reconsideration,* however, has clouded that initial finding and placed a substantial administrative and billing burden on facilities-based carriers. Specifically, as part of its decision to increase the *de minimis* exemption amount from $100 to $10,000,[15] the Commission modified its policies:

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[12] Petitions for review were filed with the U.S. Court of Appeals for the D.C. Circuit by AirTouch Communications, Inc., the Cellular Telecommunications Industry Association, and Sprint Spectrum L.P., d/b/a Sprint PCS. The appeals have been consolidated into a single case, Cellular Telecommunications Industry Association v. FCC, Case No. 97-1690, and consolidated cases.

[13] This section addresses issues associated with items 1 and 3 of the *Public Notice.*

[14] *E.g, Universal Service Report & Order,* 12 FCC Rcd at 9175 (listing "resale services" as an example of interstate telecommunications); *id.* at 9179 (finding "no reason to exempt from contribution any of the broad classes of telecommunications carriers that provides interstate telecommunications services, including ... resellers ..."). *See also 47* C.F.R. § 54.703(a).

[15] Specifically, the Commission decided that, "[i]f a contributor's annual contribution would be less than $10,000, it will not be required to contribute to universal service." *Universal Service Fourth Report on Reconsideration,* ¶ 297. Entities qualifying under the *de minimis* exemption (continued . . .)

> To maintain the sufficiency of the universal service support mechanisms, we conclude that entities that qualify for the *de minimis* exemption should be considered end users for Universal Service Worksheet reporting purposes. Entities that resell telecommunications and qualify for the *de minimis* exemption must notify the underlying facilities-based carriers from which they purchase telecommunications that they are exempt from contribution requirements and must be considered end users for universal service contribution purposes. Thus, underlying carriers should include revenues derived from providing telecommunications to entities qualifying for the *de minimis* exemption in lines 34-47, where appropriate, of their Universal Service Worksheets.[16]

The Commission apparently did not evaluate the practical effect of this decision on the business activities and universal service reporting obligations of facilities-based carriers. In the paging industry, for example, resellers constitute a significant portion of the customer base. Many of these resellers may be smaller entities. Whether they qualify for the *de minimis* exemption may vary from year to year, depending upon their business operations as well as the levels of the quarterly contribution factors adopted by the Commission. Indeed, for resellers near the *de minimis* limit, their qualification under this standard could vary between the two required reporting periods each year, depending upon the adjustments the Commission will make in order to meet the universal service funding obligations. Moreover, some resellers may not be able to determine whether they qualify under the *de minimis* exemption before completing the calculations required by Form 457 and awaiting each of the Commission's quarterly determinations of requisite contribution factors.

(. . . continued)
also will not have to file the Form 457 Universal Service Worksheet. *Id. See also* revised 47 C.F.R. § 54.705.

[16] *Universal Service Fourth Order on Reconsideration,* ¶ 298. The Commission adopted a similar approach for systems integrators whose telecommunications revenues (generally derived from resale activities) amount to less than five percent of revenues derived from providing systems integration services. *Id.*, ¶¶ 280-281.

While the Commission has placed on the reseller the burden of reporting to the underlying facilities-based carrier that it is exempt from universal service filing and contribution requirements,[17] the mechanics of that process have been left wholly undefined. Indeed, the revised rules adopted with the *Universal Service Fourth Order on Reconsideration* do not include any provisions setting forth the notification obligation imposed by the Commission in the text of its decision. Further, as explained *infra*, there remain many resellers that are unaware of their universal service obligation.

The action taken in the *Universal Service Fourth Order on Reconsideration* places upon facilities-based carriers an untenable — and apparently unrecognized — billing burden. The Commission has made clear that carriers may pass through to their customers, on some reasonable basis, an amount associated with the universal service contribution related to the end user revenues derived from that particular customer.[18] On the other hand, where a facilities-based carrier may exclude the revenues of a reseller from its determination of total end user revenues, many (if not most) facilities-based carriers are not imposing any charge on the reseller in connection with universal service contribution obligations. The result of this dual treatment of different categories of resellers is to force facilities-based carriers to levy different rates for the services provided to resellers, based on whether they fall into the *de minimis* exemption category or not. That fact alone presents serious billing problems for facilities-based carriers. It is

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[17] Although this obligation is reflected in the text of the *Fourth Report on Reconsideration*, it does not appear to be embodied in any of the rule modifications adopted in that order.

[18] *Universal Service Report & Order*, 12 FCC Rcd at 9210-9212.

rendered even more difficult in the event the facilities-based carrier is not provided with timely notice by its resellers concerning whether they fall within the scope of the *de minimis* exemption.

Finally, and perhaps most significantly, the Commission apparently is attempting to shift the burden of enforcing the universal service obligations applicable to resellers to the underlying facilities-based carriers. Facilities-based carriers should be entitled to exclude the revenues of resellers from their end user revenue base reported to the Commission. Yet, in the case of resellers that do not meet the *de minimis* exemption standard. the Commission has taken the view that reseller revenues may be excluded by the facilities-based carrier only if the underlying carrier has some reasonable basis for believing that the reseller is going to fulfill its independent universal service obligation.[19] This interpretation apparently seeks to make facilities-based carriers the enforcers of reseller universal service requirements. This enforcement responsibility, however, lawfully belongs to the Commission and not to facilities-based service providers.

Moreover, despite finding that the public interest would be served by increasing the amount of the *de minimis* exemption, the Commission nonetheless seeks to recover universal service contributions associated with the business activities of the smaller resellers from those entities that provide the underlying service. No such recovery of universal service funds, however, is contemplated in connection with exempt entities that are not resellers. Section 254(d) does not appear to justify this discriminatory distinction that shifts the contribution burden from *de minimis* (exempt) resellers to the entities that provide them service.

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[19] *See* FCC Public Notice, *WTB Information Bulletin, Universal Service Update: Frequently Asked Questions by Wireless Service Providers*, DA 97-2157 (rel. Oct. 6, 1997) *("CMRS FAQ Public Notice")*. This policy is nowhere codified in the Commission's rules.

Accordingly, the Commission's recent action in the *Universal Service Fourth Order on Reconsideration* muddies the Commission's interpretation of Section 254(d) of the Telecommunications Act of 1996. The *Order* also imposes inequitable burdens on facilities-based carriers that provide services to certain categories of resellers. The issues surrounding reseller participation in the universal service program should be explained to Congress, so that Congress may more easily analyze and evaluate the Commission's actions in this area to date.

IV. THE COMMISSION HAS FAILED TO PUBLICIZE ADEQUATELY THE REPORTING AND CONTRIBUTION REQUIREMENTS[20]

PCIA is concerned about the manner in which the Commission has publicized the obligations of those entities required to make contributions to the universal service funds. Specifically, the Commission has made little effort to inform all obligated entities that they must submit the Form 457 and make payments. With the revised structure for collecting universal service funds, potential contributors number in the thousands, and many are small businesses with very limited dealings with the Commission.

The Commission's approach was reflected in the obscure manner in which it first released the Form 457. The form was initially published in draft version as part of a very lengthy decision adopting policies to permit the National Exchange Carrier Association to serve as temporary administrator of the universal service fund.[21] The draft form was included as an

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[20] This section addresses issues associated with item 3 of the *Public Notice*.

[21] *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, FCC 97-253, at Appendix C-1 (rel. Jul. 18, 1997) (Report and Order and Second Order on Reconsideration).

appendix to this order, and was referenced only in paragraph 80 of the decision. Many readers of the order did not realize the significance of the form until well after the order was released. Days later, while members of the telecommunications industry were still trying to understand the form, let alone assess its implications, the Commission announced that the Office of Management and Budget had approved the form on July 31, 1997.[22] The Commission further indicated that the Form 457 would have to be filed less than 30 days later, by September 1, 1997.[23]

The Commission apparently has expected the trade associations to undertake the task of publicizing the revised universal service obligations and responding to questions about implementation of the Commission's new structure. While PCIA and other organizations have taken a number of steps to inform their members about the Commission's universal service rules, many potential contributors are not members of communications trade organizations. Thus, for the Commission to rely entirely on trade associations and trade press for distribution of obligation information means that many potential contributors are still totally unaware of their obligations.

This problem is especially difficult for non-licensees, such as resellers. A significant number of resellers do not hold FCC licenses; many do not belong to any communications-related trade associations. As a result, many of these entities have not received correct information about the nature of their universal service obligations. Moreover, since these entities do not hold FCC licenses, the Commission has no means by which to track whether these entities

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[22] FCC Public Notice, *FCC Announces Release of Universal Service Worksheet, FCC Form 457*, CC Dkt. Nos. 97-21, 96-45 (rel. Aug. 4, 1997).

[23] *Id.* at 1.

make the required payments to support universal service. If the Commission is going to ensure that the universal service obligations imposed by the Telecommunications Act of 1996 and associated administrative regulations are to be applied even-handedly, it must do much more to publicize the nature of the new regulatory requirement.

The Commission should report to Congress its lack of a serious, concerted publicity effort to explain universal service funding rules. The absence of such an effort clearly implicates the efficacy of the Commission's efforts to ensure that all covered contributors make their required payments.

V. AT LEAST IN THE CMRS CONTEXT, THE FORM 457 AND ITS ASSOCIATED INSTRUCTIONS ARE SERIOUSLY DEFICIENT[24]

PCIA previously filed comments with the Commission outlining a number of problems with the Form 457 and its administration.[25] PCIA believes that a number of concerns it raised in those comments are relevant to the Commission's examination in the forthcoming report to Congress of its implementation of the statutory plan.

The Form 457 Is Geared Toward Traditional Telephone Service Providers and Does Not Account for Considerations Unique to CMRS Licensees. The form clearly was developed contemplating only traditional telephone service providers and their accounting and recordkeeping practices, many of which are wholly inapplicable to the CMRS industry. For

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[24] This section address issues associated with item 5 of the *Public Notice*.

[25] Comments of the Personal Communications Industry Association, In the Matter of FCC Form 457, Universal Service Worksheet, Extension of a Currently Approved Collection Under the Paperwork Reduction Act of 1995 (filed Oct. 24, 1997).

example, the form relies heavily on the Uniform System of Accounts ("USOA"). CMRS carriers, however, generally do not use the USOA and are not even familiar with its terms.

The Commission Has Failed To Provide Reasonable Guidance for the Allocation of CMRS Revenues Between Interstate and Intrastate. Despite numerous concerns being raised by interested parties or their representatives, the Commission has failed to provide any reasonable guidance concerning the allocation of CMRS revenues between the interstate and intrastate jurisdictions. At present, there is no established mechanism for CMRS carriers to determine the interstate or intrastate nature of a communication. The Commission, in response to the numerous concerns raised by entities seeking to comply as fully as possible with their legal obligations, has stated only that licensees should provide a "good faith estimate" of such figures. This statement, however, left many wireless carriers with little effective guidance and little confidence about their compliance with the Commission's requirements.

The Form 457 Instructions Impose Unnecessary Separate Affiliate Filing Requirements. The Form 457 itself requires separate filings for each affiliate or subsidiary. The Commission's staff, however, has indicated that only "billing entities" need to complete the form.[26] In either case, however, the Commission has not justified the need for separate filings. Instead, there is no reason not to permit entities that employ consolidated financial statements for all subsidiaries and affiliates to submit a single, combined Form 457. The effect of the Commission's approach is to require consolidated business operations to reorganize and disassemble their books of account, with no apparent justification for doing so. The result is to increase, both needlessly and substantially, the amount of paperwork that telecommunications

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[26] *See, e.g., CMRS FAQ Public Notice* at 4.

carriers must complete and submit to the Commission or the universal service fund administrator.

Form 457 Erroneously Requires Submission of Total Billables Instead of Revenues. The Form 457 requires submitting carriers to provide gross revenue information, defined as "total revenues billed to customers during the filing period with no allowances for uncollectibles or out-of-period adjustments."[27] These filing instructions run counter to the Commission's proceedings seeking to implement the universal service requirements embodied in Section 254 of the Telecommunications Act of 1996. At no time did the Commission suggest that it would employ a concept of "revenues" that meant "billables." In fact, it is reasonable for carriers to expect that the term "revenues" would be used in its usual sense to refer to funds actually received, rather than to amounts billed to customers that may not be collected in full for a number of reasons.

The Form 457 Inappropriately Treats Certain Billing and Collection Fees as Revenue Subject to Universal Service Contribution. To date, the Commission has provided inconsistent guidance concerning whether billing and collection fees, as well as activation charges, are to be included in the amounts that form the basis for determining the level of a carrier's universal service contribution. If, as the Commission has stated,[28] billing and collection fees are to be excluded from the base on which universal service contributions are to be calculated, then activation charges — which are nothing more than set-up costs in connection

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[27] Universal Service Worksheet, FCC Form 457, Instructions for Completing the Worksheet for Filing Contributions to the Universal Service Support Mechanisms at 11 ("*Form 457 Instructions*"). *See also CMRS FAQ Public Notice* at 4.

[28] *See Form 457 Instructions* at 13; *CMRS FAQ Public Notice* at 5.

with the carrier's billing and collection system — also should not form part of the basis for determining required universal service contribution amounts.

FCC Form 457 Directs Carriers To Submit Information That Is Not Required for the Calculation of Universal Service Contributions. The Form 457 instructions require carriers to report gross revenues "from all sources, including nonregulated and non-telecommunications services."[29] Because universal service contributions are to be based only on revenues related to telecommunications services,[30] there is no apparent reason for the Commission to require the submission of such data, and the Commission itself has provided no justification.

These concerns about the Commission's Form 457 raise questions about its equitable treatment of all carriers subject to universal service funding obligations. At a minimum, the Commission should acknowledge to Congress that specific issues have been raised about the administration of the reporting and collection process, and that the Commission is — or at least PCIA assumes it is — taking steps to resolve the significant concerns raised by the CMRS industry and others with respect to the Commission's universal service program.

VI. CONCLUSION

The discussion above demonstrates why the Commission should report to Congress that there are a number of serious questions about the Commission's interpretation of Congressional intent and the statutory requirements related to universal service. Similarly, the Commission has

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[29] *Form 457 Instructions* at 11.

[30] *See Universal Service Report & Order*, 12 FCC Rcd at 9206.

not yet resolved numerous significant concerns regarding its administration of the program. Certainly, these matters also relate to the information and analysis sought by Congress. Full disclosure of these important questions and disagreements is necessary to ensure that Congress will have a full picture of the current status of the Commission's attempt to meet Congressional intent through implementation of the universal service obligations set forth in Section 254 of the Telecommunications Act of 1996.

Respectfully submitted,

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